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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92051465
Party	Defendant Edge Games, Inc., and Future Publishing, Ltd.
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Attachments	TTABletterReTerminatedProceedingsEarly7May2013.pdf(143065 bytes)

Trademark Trial & Appeal Board
& The Commissioner for Trademarks
United States Patent & Trademark Office
P.O. Box 1451
Alexandria, VA 22313-1451

May 7, 2013

Electronically Filed and Via Express Mail

Re: EA Digital Illusions CE AB & Electronic Arts, Inc. v. Edge Games, Inc. & Future Publishing, Ltd; Cancellation No. 92051465

Dear Sir or Madam,

In conducting a routine inspection of the TTAB record today we were alarmed to discover that while **these proceedings are not completed yet**, the Board had prematurely rendered a decision and terminated these proceedings.

On April 29, 2013 the Petitioners and Co-Defendant Future filed an Opposition to our various Motions before the Board. **We are permitted 20-days from the filing of this Opposition to file our Reply. Thus the Board rendered its May 1, 2013 decision and terminated these proceedings when Co-Defendant Edge's time to file its Reply to the Opposition had not yet expired, thus denying Edge its right of Reply before a decision is rendered.**

Second, the decision issued by the Board on May 1, 2013 only covered some, but not all, of the timely motions before the Board still waiting to receive a decision by the Board. Co-Defendant Edge had several live motions before the Board that it was improper to merge and refer to all of them collectively as just a Motion for Reconsideration – some of the documents Edge filed were indeed a Motion for Reconsideration, but there were also timely separate motions that were deserving of separate Board decisions, motions that pre-dated the Board's original decision of April 9, 2013 and thus could not fairly be later construed as part of a Motion for Reconsideration. Yet this is apparently what the Board did in error in these proceedings.

Our Motion to Confirm the 2010 District Court Final Order as Void on its Face was timely filed on March 19, 2013 if it was filed before a final decision in this

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matter had been rendered – which it was. While the issue of the Court's Final Order being void had been covered to some extent in prior submissions by Petitioners and both Defendants, and commented upon to some extend by the Board over the past two and half years, at no time had the Board made a clear ruling on this critical issue. Consequently, Co-Defendant Edge's Motion was not only timely but also valid, critical and justifiable.

The Board's May 1, 2013 decision specifically references Edge's point that the Court did not certify the final order "to the Director" (page 2) and yet does not return to this entirely valid point to render a decision on it.

The Board also did not render any decision on Edge's Motion to Dismiss that was based on at least three valid grounds for dismissal:

1. That the 2008 District Court Order governs here since it was fully litigated and hence through non-mutual Estoppel means that the instant cancellation proceedings should indeed have been dismissed with prejudice in October 2009 as Edge requested.
2. That Petitioners never had an issue (standing) in these proceedings since Edge's trademark registrations (most co-owned with Future) were not stopping Petitioners from registering the mark MIRROR'S EDGE as Petitioners falsely stated in order to try to gain standing to file the instant petition.
3. The October 2010 settlement between the parties calls for Edge to be deemed not to have committed fraud on the PTO or to have abandoned any of its marks, and hence stands as irrefutable grounds for dismissing the instant proceedings as of October 2010.

The Board also rendered no decision on any of these live issues under Motion before the Board and which were entitled to have decisions made on them before the Board rendered any final decision in this matter or terminated the proceedings.

The District Court's Order Cannot Be Used To Determine These Cancellation Proceedings by Granting Petitioners' Petition

And Edge notes again that at Docket #33 Petitioners withdrew their request for entry of judgment in their favor in these proceedings based on the 2010 District Court Order since Petitioners were well aware that it was contractually barred[1] from using the Court Order to gain a final decision in its favor in respect to these cancellation proceedings. Edge has also reminded the Board that Petitioners have carefully never repeated their request that the Board accept the Court Order as grounds to grant the petition in their favor – and for good reason since Petitioners are Estopped from doing so. Consequently, the Board should not have used the District Court Order to render a decision in Petitioners' favor styled as "granting the petition" (as the Board mistakenly did in Docket #94).

[1] Edge maintains the 2010 Settlement is invalid since Edge was not authorized to enter into it as Future itself confirmed in Docket #40. But Petitioners argue the settlement is valid.

Turning now to the comments made by the Board in its May 1, 2013 Untimely Decision:

A. Board's Misunderstanding of Edge's Argument Regarding When an Order is Void on its Face

On page 2 of its decision the Board makes an extremely odd mis-statement of what Edge argued in its recent Motion to Confirm the Court Order Void. For some strange reason the Board suggests that what Edge was saying was that the *Plotitsa v. Superior Court* cite shows that

> *"the entire court record must be inspected to determine whether an order is void on its face (that is, that an order void on its face is NOT void on its face)."*

This is not stated by Edge either in its recent Motion to Confirm or in Edge's other submissions in 2011 and 2012 that made this same argument (to which the Board had never responded before).

While Edge did not intend to confuse the Board, and perhaps Edge's presentation was not artful, but by using the construct of putting square brackets around a word in a cite Edge was hoping the Board would understand these were words added by Edge to hopefully make the cite more clear to the Board. Hence when Edge cited recently and previously in at least 2012 and possibly in 2011 filings, too:

> *"It is well settled that a judgment or order which is void on its face [is one] which requires only an inspection of the judgment-roll or record to show its invalidity."*

Here Edge was not seeking to mislead the Board by adding its own words "[is one]" – on the contrary, Edge was seeking to clarify the cite (albeit in hindsight, perhaps unartfully).

The Board suggests that Edge changed the wording of the *Plotitsa v. Superior Court* cite from one that goes against Edge's argument to one that is in favor of it. **This is not true**. The original wording states essentially the same thing, which fully supports what Edge was stating. Namely, the court in *Plotitsa v. Superior Court* ruled that any judgment or order that is void on its face and can be determined to be void by just inspecting the public record (judgment-roll or record), is one that is void on its face and hence invalid.

This adding back in the word "and" as the Board did does not change the meaning from what Edge was arguing – it confirms Edge's argument.

The Board has, with respect, misread the *Plotitsa v. Superior Court* ruling – it is not saying that two conditions must be met in the sense that the Board seems to think it means that. What it means is that if an order is void on its face **in the sense that the fact it is void can be easily determined by inspecting the court record**, THEN that order is void on its face. The court's decision was not saying this as if it were two separate conditions that must be met, that is a misreading of the court's ruling by the Board.

Here, the District Court's 2010 Final Order is void on its face because – in full compliance with the *Plotitsa v. Superior Court* opinion – it can be easily seen to be void on its face by simply inspecting the judgment-roll or record. That is, it is void on its face because the Order called for the cancellation of trademark registrations co-owed by Future, yet a simple inspection of the judgment-roll and record reveals that Future were not a party to the case, and hence per *Plotitsa v. Superior Court* the Order is ipso facto void on its face (*void ab initio*).

B. Board's Misunderstanding of Edge's Addition of the Phrase "Or Reverse"

Similarly, the Board completely misunderstood why Edge added the words "or reverse" (see page 4 of the Board's May 1st decision). Once again, this may have been unartful by Edge, but Edge understood that the Board would appreciate that all words added in square brackets were words added by Edge to help clarify the cited concept.

By adding "or reverse" Edge was not seeking to confuse or mislead the Board, rather Edge was hoping to clarify the cite to the Board. The simple point that Edge was making, which it would appear the Board agrees with, is that if the Court has already ruled that it cannot affirm an order that is void on its face since that would suggest the order is valid, similarly, clearly, the Court cannot reverse an order either, since that also would suggest the order is valid (since only valid orders can be either affirmed or reversed).

Perhaps the Board became confused by Edge specifically stating "or reverse" rather than "or confirm as void" (or similar). Again, Edge was not suggesting that the Appellant Court cannot determine that a void order is void. But what Edge was stating – perhaps too subtly – was that the Appeal Court would not technically be "reversing" a void order but would merely be ruling it is void and the very act of doing so renders it as if has never existed (hence it does not need to be "reversed").

Nothing Edge did here then was at all unacceptable – or should not have been. Edge was only making entirely valid arguments, if they were perhaps unartfully argued since Edge is not represented by Counsel better able to form legalistic wording.

C. "The Board is not the forum for such attacks"

The Board states that it has previously suggested (page 5 of its May 1st decision) that the Board is not a forum for Edge to attack the validity of the 2010 District Court Final Order.

With deep respect, Edge cannot conceive of a better and more appropriate forum to discuss whether a Court Order is void or not as in a forum where an entity (here the Board) is seriously considering acting on a void order.

Further, with deep respect, **the Board has sent out mixed messages on this issue since October 2010.** If the Board felt that it had to act on the 2010 Court Order and could not consider argument about whether the order is void or not, then:

- **Why didn't the Board cancel the instant registrations in October 2010 when it was supplied with the order?**
- **Why did the Board continue to encourage and consider numerous submissions from both Defendants and the Petitioners for two and a half years on the topic of whether the District Court Order is void or not, if the Board believes that this is not a forum for such discussion?**

Certainly, **the Board gave Edge every reason to believe that the Board felt this was an appropriate forum** to attack the validity of the 2010 Court Order since:

- **the Board permitted argument from all parties on the topic for two and a half years, and**
- **the Board actively failed to cancel the marks based on the Court's Order thus giving the clear impression the Board was treating the Order as invalid.**

Two other observations of the Board's actions (and in-actions) over the past two and half years since being served with the 2010 Court Order are also relevant:

(i) It was not until one and a half years after the Board was served with the Final Order when the Board finally gave Edge 20-days to show evidence that it had appealed the Court Order (March 2012) or had otherwise sought modification or other relief, and

(ii) Even then, the Board went out of its way in its April 9, 2013 decision to state that it was not in any sense requesting that Edge seek relief from the Final Order, the Board was merely asking if Edge had done so as at that date.

By March 2012 the Board had received numerous confirmations that the 2010 Court Order is void on its face, and thus there is no time limit at all to challenge the order as void. Even Petitioners in their Response to what the Board wrote in March 2012 confirmed that Edge has no time limit at all to file a motion under Rule 60(b)(4) to request the order be deemed void.

Last, the Board certainly acted as if it felt this was a valid forum to discuss and attack the 2010 Order since the Board repeatedly opined on the issues being argued regarding whether the court or is void on its face, and indeed continues to opine on these issues in its May 1, 2013 decision. By accepting the arguments and responding to them, and giving the opinion that the citations are "frivolous"[2] the Board has essentially affirmed that this is indeed a valid forum to address these issues.

[2] Although Edge is shocked to learn that the Board feels perfectly valid Appellant and Supreme Court citations *specifically on the issue of void orders* are "frivolous," "improper," or "misleading."

D. Certified Copies of the Order(s) Never Requested in 2010 (or 2011, or 2012)

And it cannot be that the Board did not act on the 2010 Court Order for two and a half years simply because it had not yet been supplied with "certified" copies of the Order – since clearly if this was preventing the Board acting on the Order when it was first filed with the Board in October 2010 then the Board would have requested certified copies of the Order(s) in October 2010. Or, at least, would not have taken two and a half years to wait before asking for certified copies.

E. The Board's Criticism of Edge's Multiple Filings

With respect, the Board went silent on the parties from August 2012 until March 2013, whereupon the Board took an entirely new and unexpected tact. Further, in its March 8, 2013 letter the Board made no mention of the various live issues that Edge had validly placed before the Board awaiting the Board's decisions. Thus Edge was left with no option than to file several new Motions to seek to gain decisions from the Board to these various un-addressed and critical issues – not least since the Board appeared to be about to ignore all the issues before it since 2010 and issue a final decision based solely on a sudden request for certified copies of the orders. Edge thus believes that not only were its multiple filings reasonable and justified, Edge feels it was left with no option other than to make such filings given the Board's silence for 7 months only to be followed by a letter that seemed to ignore all the motions and filings made by all parties prior in August of 2012 and earlier that were not addressed.

In sum, the Board's actions (or inaction) in not acting on the 2010 Court Order for two and a half years gave Edge to believe that the Board accepted this was a valid forum to dispute/attack the Court's Order, and also gave Edge to believe that the Board shared Edge's view that the Order was (and is) invalid. By waiting two and a half years before asking for certified copies and acting on the Order, the Board has delayed Edge having any clear reason to take alternate action to either have the Order deemed void (by a forum other than the Board), or take any other action. The Board's failure to act on the Court Order for two and a half years sent a clear message to Edge that despite what the Board may have written in some responses, the Board too acted as if the Court Order was invalid and hence should not be acted upon.

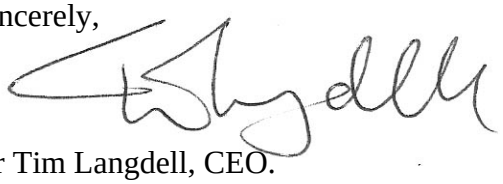
For all the above reasons, and since the Board rendered its May 1, 2013 decision and terminated the proceedings when Edge had not yet had its time to file its Reply, Edge asks that the proceedings be reopened.

Edge further requests that the final decision rendered in Docket #106 be vacated and that no decisions be issued by the Board until both of Edge's two live Motions (to Dismiss and to Confirm the Court Order Void) have been fully argued and until Edge's Reply to Petitioners' Opposition to Edge's Motion for Reconsideration is filed and considered.

Edge thus asks that the proceedings be re-activated, the decision at Docket #106 be vacated, Edge be permitted the balance of its 20-days to file a Reply to Petitioners' Opposition starting from when the Board reactivates these proceedings, and that the Board do not terminate these proceedings until it has fully considered and ruled upon all THREE valid, live motions before it.

Thank you,

Sincerely,



Dr Tim Langdell, CEO.
cc. Petitioners and Co-Defendant Future Publishing Ltd.